NO. 80-1604

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

SPOKANE ARCADES, INC., A Washington Corp., PLAYTIME THEATRES, INC., A Washington Corp., J-R DISTRIBUTORS, INC., a Washington Corp., and SPORTLAND AMUSEMENT, INC., a Washington Corp.,
Plaintiff-Appellees

v.

DONALD C. BROCKETT, Prosecuting Attorney, in his representative capacity only,
Defendant-Appellant

and

THE HONORABLE DIXIE LEE RAY, as Governor of the State of Washington in her representative capacity only, HONORABLE BRUCE K. CHAPMAN, Secretary of State of Washington, in his representative capacity only, HONORABLE SLADE GORTON, as Attorney General of the State of Washington in his representative capacity only
Defendants.

On Appeal from the
Ninth Circuit Court of Appeals

JURISDICTIONAL STATEMENT

DONALD C. BROCKETT
Spokane County Prosecuting Atty.
Spokane, Washington 99260
(509) 456-3662

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QUESTIONS PRESENTED

WHETHER A FEDERAL COURT SHOULD ABSTAIN FROM DECIDING THAT A STATE STATUTE IS UNCONSTITUTIONAL ON ITS FACE PRIOR TO ANY ACTUAL CASE OR CONTROVERSY EXISTING IN WHICH A STATE COURT HAS HAD THE ABILITY TO AUTHORITATIVELY CONSTRUE THE STATUTE AND WHERE NO SHOWING HAS BEEN MADE THAT STATE PROCEDURE IS INADEQUATE IN THEORY OR PRACTICE?

WHETHER OR NOT THE NINTH CIRCUIT MISREAD AND THUS MISAPPLIED VANCE v. UNIVERSAL AMUSEMENT CO., INC., 63 L.Ed.2d 413 (1980) SO AS TO HOLD INITIATIVE NO. 335 (NOW CODIFIED AS REVISED CODE OF WASHINGTON 7.48.050-100, 900) UNCONSTITUTIONAL ON ITS FACE AS A PRIOR RESTRAINT ON PROTECTED MATERIAL UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

WHETHER OR NOT A DISTRICT COURT SHOULD BE FORECLOSED FROM DECIDING A MATTER DIFFERENTLY FROM THE DECISION OF THE UNITED STATES SUPREME COURT INVOLVING A SIMILAR STATUTE, WHEREIN THIS COURT DISMISSED AN APPEAL "FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION"?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.	iii
OPINIONS BELOW.	1
JURISDICTION.	1
STATUTORY PROVISIONS INVOLVED .	1
STATEMENT OF THE CASE	1
STATEMENT OF REASONS FOR PLENARY REVIEW	3
STATEMENT I.	3
STATEMENT II	8
STATEMENT III.	11
CONCLUSION.	15
APPENDIX.	1a
DISTRICT COURT OPINION . .	1a
NINTH CIRCUIT COURT OPINION	38a
RCW 7.48	48a
COURT OF APPEALS ORDER . .	65a
NOTICE OF APPEAL	67a

TABLE OF AUTHORITIES

PAGE

CASES

ALLEN v. McCURRY, et al., ___ U.S. ___, 66 L.Ed.2d 308 ___ S.Ct. ___, (1980). .5, 6, 7

ART THEATRE GUILD, INC., et al. v. Ewing, 421 U.S. 923. . . . . .2, 12

BELLOTTI v. BAIRD, 428 U.S. 132, 49 L.Ed.2d 844, 96 S.Ct. 2857 (1976) . . . 5

COLORADO RIVER WATER CONS. DIST. v. U.S., 424 U.S. 800, 47 L.Ed.2d 483, 96 S.Ct. 1236 (1976), rehearing denied 426 U.S. 912, 48 L.Ed.2d 839, 96 S.Ct. 2239 4

COLORADO SPRINGS AMUSEMENTS, LTD. etc. et al. v. RIZZO 428 U.S. 913, 49 L.Ed.2d 1222, 96 S.Ct. 3228 (1976) 15

HICKS v. MIRANDA, 422 U.S. 332, 45 L.Ed.2d 223, 95 S.Ct. 2281 (1975). 12

JUIDICE v. VAIL, 430 U.S. 327 (1977) 4, 5

MILLER v. CALIFORNIA, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) 9

MOORE v. SIMS, 442 U.S. 415, 60 L.Ed.2d 994, 99 S.Ct. 2371 (1979). 4

MUGLER v. KANSAS, 123 U.S. 205, 31 L.Ed. 652 (1887) . 11

NEAR v. MINNESOTA, 283 U.S. 697, 75 L.Ed. 1357, 51 S.Ct. 625 (1931) 11

OHIO BUREAU OF EMPLOYMENT SERV. v. HODORY, 431 U.S. 471, 52 L.Ed.2d 513, 97 S.Ct. 1898 (1977). 4

SINGLETON v. COMMISSIONER, 439 U.S. 940, 58 L.Ed.2d 335, 99 S.Ct. 335 (1978) . 15

U.S. v. THIRTY-SEVEN PHOTOGRAPHS, 402, U.S. 363, 28 L.Ed.2d 822, 91 S.Ct. 1400 5

VANCE v. UNIVERSAL AMUSEMENT CO., INC., ___ U.S. ___, 63 L.Ed.2d 413, ___ S.Ct. ___ (1980) 8

YOUNGER v. HARRIS, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971) 3

STATUTES

RCW 7.48.050-100, 900 1

RCW 7.48.050(2) 9

RCW 7.48.052(1) 10

RCW 7.48.052(2) 10

RCW 7.48.052(3) 10

RCW 7.48.052(4) 10

RCW 7.48.052(5) 10

RCW 7.48.064. 9

RCW 7.48.066. 9

RCW 7.48.066. 8

28 USC § 1254(2). 1

28 USC §1331(a) 6

28 USC § 1343(3). 6

28 USC § 2201 6

28 USC § 2202 6

OTHER AUTHORITY

SUMMARY DISPOSITION OF SUPREME COURT APPEALS: THE SIGNIFICANCE OF LIMITED DISCRETION AND A THEORY OF LIMITED PRECEDENT, 52 B.U.L. Rev. 414 . . . . . 13, 14

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Washington, Northern Division, is reported at 449 F.Supp. 1145, (Appendix, 1a-37a). The opinion of the Ninth Circuit Court of Appeals is reported at 631 F2d 135, (Appendix, 38a-47a).

JURISDICTION

Appellant appeals from the judgment of the Ninth Circuit Court of Appeals entered October 23, 1980, rehearing denied December 16, 1980, (Appendix, 65a-66a) which affirmed the judgment of the United States District Court for the Eastern Division of Washington, Northern Division, holding that the Washington Statute, Revised Code of Washington, 7.48.050-100, 900 was unconstitutional.

Notice of appeal was given February 5, 1981, (Appendix, 67a-68a). This Court has jurisdiction under 28 USC § 1254(2).

STATUTORY PROVISIONS INVOLVED

The statute involved is Revised Code of Washington 7.48.050-100, 900, (Appendix, 48a-64a).

STATEMENT OF THE CASE

The statute involved in this case was approved by the people of the State of Washington as an Initiative on November 8, 1977. Before the statute was even certified by the Secretary of State,

the respondents, corporations engaged in the exhibition, sale or distribution of motion picture films, books and magazines in Washington, petitioned the United States District Court for the Eastern District of Washington, Northern Division, for a Declaratory Judgment that the statute was unconstitutional on its face as a prior restraint in violation of the First Amendment to the United States Constitution.

Appellant argued that the Federal Court should abstain by virtue of the fact that there had been no actual case or controversy before any state court in order that the statute be authoritatively construed. The District Court Judge, the Honorable James M. FitzGerald, overruled this argument and held that the issue of the constitutionality of the statute could be reached.

Appellant argued that the statute provided a legitimate method to effectively determine obscenity to be a nuisance after a full hearing before a court and provided remedies to abate the nuisance. The District Court overruled this argument and held that the statute amounted to a prior restraint prohibited under the First Amendment to the United States Constitution and thus was unconstitutional.

Appellant argued that the civil procedure, similar to that of the State of Ohio, had been upheld and approved by this Court when the case of Art Theatre Guild, Inc., et al v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (1975), was dismissed "for want of a substantial Federal question." The District Court

overruled this argument and held that the procedures were not similar.

Notice of appeal was given by appellant to the Ninth Circuit Court of Appeals on May 19, 1978. The Ninth Circuit Court of Appeals affirmed the District Court in an opinion filed October 23, 1980. A Petition for Rehearing was denied on December 16, 1980.

STATEMENT OF REASONS FOR PLENARY REVIEW

I.

WHETHER A FEDERAL COURT SHOULD ABSTAIN FROM DECIDING THAT A STATE STATUTE IS UNCONSTITUTIONAL ON ITS FACE PRIOR TO ANY ACTUAL CASE OR CONTROVERSY EXISTING IN WHICH A STATE COURT HAS HAD THE ABILITY TO AUTHORITATIVELY CONSTRUE THE STATUTE AND WHERE NO SHOWING HAS BEEN MADE THAT STATE PROCEDURE IS INADEQUATE IN THEORY OR PRACTICE?

If the statute had been certified by the Secretary of State and an action had been brought in the Washington State Courts, it is clear that the court would have been forced to abstain. Younger v. Harris, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971). That this is the most appropriate way for state statutes to be considered in our federal system was recognized in Younger, supra, at 401 U.S. 52, when the Court stated that the duty of the federal judiciary:

> . . .does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them. . . .

In addition, the Court has recognized under the Pullman type of abstention that there is:

> . . .the possibility that the state courts may interpret a challenged state statute so as to eliminate, or at least to alter materially, the constitutional question presented. Railroad Comm'n v. Pullman Co., 312 US 496, 85 L.Ed. 971, 61 S.Ct. 643 (1941). See Bellotti v. Baird, 428 US 132, 49 L.Ed.2d 844, 96 S.Ct. 2857 (1976).

Ohio Bureau of Employment Serv. v. Hodory, 431 U.S. 471, 477, 52 L.Ed.2d 513, 97 S.Ct. 1898 (1977); Colorado River Water Cons. Dist. v. U.S., 424 U.S. 800, 47 L.Ed.2d 483, 96 S.Ct. 1236 (1976) rehearing denied 426 U.S. 912, 48 L.Ed.2d 839, 96 S.Ct. 2239.

This Court has recently reminded us that:

> . . .the Federal Court should not exert jurisdiction if the plaintiffs 'had an opportunity to present their federal claims in the state proceedings. Juidice v. Vail, 430 U.S. 327, 337 (1977) (Emphasis in original). . . .'

Moore v. Sims, 442 U.S. 415, 425 , 60 L.Ed.2d 994, 99 Sup. Ct. 2371 (1979).

Also that in Moore v. Sims, supra, 442 U.S. 427:

> . . .The breadth of a challenge to a complex State statutory scheme has traditionally militated in favor of abstention, not against it. . . . (Emphasis in original).

Furthermore, it is questionable whether the District Court had jurisdiction to hear the case, for as said in U.S. v. Thirty-seven Photographs, 402 U.S. 363, 369, 28 L.Ed.2d 822, 91 S.Ct. 1400:

> . . .we lack jurisdiction authoritatively to construe State Legislation.

Because the Respondents had an opportunity to present their issues to the state courts in which event many of the procedures would have been authoritatively construed, perhaps avoiding the necessity of a federal constitutional adjudication, the court should have abstained. Bellotti v. Baird, 428 U.S. 132, 49 L.Ed.2d 844, 96 S.Ct. 2857 (1976); Juidice v. Vail, supra.

This Court has spoken even more definitively in Allen v. McCurry, et al., _____ U.S. _____, 66 L.Ed.2d 308, 319, _____ S.Ct. _____ (1980), wherein it is said:

> The actual basis of the Court of Appeals' holding appears to be a generally

> framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in § 1983 itself.

Nowhere in 28 USC § 1331(a), 28 USC § 1343(3), or 28 USC §§ 2201, 2202, is such authority to be found either. In fact, the Court insisted that to have federal jurisdiction there had to be three circumstances:

> . . . where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim and where state procedural law, though adequate in theory was inadequate in practice. 365 U.S. at 173-174. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. Id., at 176. (Emphasis supplied).

66 L.Ed.2d 317.

There was absolutely no showing

that Washington courts could or would not construe and apply federal constitutional principles to the statute. Nor was there any showing that the Washington trial court might have made any of the ridiculous applications respondents suggest as justification that the statute was unconstitutional.

It is ironic that the Ninth Circuit Court of Appeals in this case indicated that abstention was inappropriate and yet in discussing the issue of severability stated:

> That the statute contains a severability clause, Wash. Rev. Code §7.48.900, does not authorize us to indulge in major revisions to salvage the statute. Id. at 833-834. We are certain that the Legislature of the State of Washington can do this better than we. (Emphasis added, Appendix [redacted], page [redacted]).

It is respectfully submitted that if the Legislature can salvage the statute the courts of Washington may also do so upon a proper case being presented to them.

The court should have abstained from even ruling upon this case and for that reason this Court should grant plenary review of the appeal.

II.

WHETHER OR NOT THE NINTH CIRCUIT MISREAD AND THUS MISAPPLIED VANCE v. UNIVERSAL AMUSEMENT CO., INC., 63 L.Ed2d 413 (1980) SO AS TO HOLD INITIATIVE NO. 335 (NOW CODIFIED AS REVISED CODE OF WASHINGTON 7.48.050-100, 900) UNCONSTITUTIONAL ON ITS FACE AS A PRIOR RESTRAINT ON PROTECTED MATERIAL UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

The Circuit erred by applying Vance v. Universal Amusement Co., Inc., _____ U.S. _____, 63 L.Ed.2d 413, _____ S.Ct. _____ (1980), to the Washington statute as controlling the question involved. In Vance, this Court held that a statutory procedure that called upon an ancillary process allowing a temporary injunction of indefinite duration upon an ex parte application showing probable success on the merits without a hearing was a prior restraint.

The Circuit decided appropriately that Vance did not strike down the procedure for a restraining order provided by RCW 7.48.062 in view of the fact that it was of limited duration even though this was the basis of the District Court holding. This difference between the District and Circuit courts obviously shows that a state court could have authoritatively construed the statute.

The Circuit erred in proceeding one step further and applying the Vance case to the temporary injunction provided by RCW 7.48.066 in view of the fact that

said temporary injunction can only be obtained after a hearing and Vance was limited to a situation which was ex parte. The Circuit also failed to consider that the temporary injunction may, but need not be applied for and if it is the hearing must be set within ten days.

The Circuit complained that "no limits are set forth in the statute to confine the discretion of the court to issue the temporary abatement injunction." Appendix, page 44a. On the contrary, the court is confined to the definition of lewd matter embodied in RCW 7.48.050(2), recognized by the Circuit as incorporating the standards approved in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). See opinion, footnote 1, Appendix, page 40a. It must obviously be established that a lewd film or lewd publication is involved on a premises before the court can hold that said premises is a nuisance.

In addition, the Circuit decided that the delay to the next term of court (which in Spokane County is the next month) would be too long and thus not a prompt judicial determination even though they cited authority holding that four to six months may be too long. The Circuit erroneously applied RCW 7.48.064 which allows the defendant, or the court to advance and consolidate the trial of the action on the merits to the hearing on the temporary injunction on the basis that there was no assurance that would occur. RCW 7.48.066 was obviously overlooked by the Circuit since it provides that the defendant shall show cause in thirty days why the injunction should not be made permanent. Hence, there is not a delay which should render the procedure invalid.

The Circuit also misapplied the thrust of the statute in thinking that it is directed at persons rather than places. Hence, the Circuit opines that the State may not place the burden on the owner to show "good faith". The appellant contends that since at that point a hearing has been held to establish that the place is a nuisance and the appropriate burden has been sustained against "the place", it is quite appropriate that the burden be on persons, such as owners, to show "good faith" in order to obtain release of the premises.

Furthermore, the Circuit misapplied the provision concerning a permanent injunction with the thought that it could constitute a prior restraint of material not yet judged to be obscene. The permanent injunction can only apply to that nuisance with reference to which the court has had a hearing, i.e., the place where lewd films are publicly exhibited as a regular course of business, etc. (7.48.052(1)), the place where a lewd film is publicly and repeatedly exhibited, etc. (7.48.052(2)), a film which is publicly exhibited at a place which is a nuisance (7.48.052(3)), a place of business in which lewd publications constitute a principal part of a stock in trade (7.48.052(4)), or a lewd publication possessed at a place, which is a moral nuisance (7.48.052(5)). Hence, material with reference to which there had not been a hearing could not be enjoined.

While it is true that a permanent closure of the place may be granted for a period of one year, that follows only as a punishment or forfeiture of property because inappropriately used.

This Court held in Near v. Minnesota, 283 U.S. 697, 714, 75 L.Ed. 1357, 51 S.Ct. 625 (1931):

> This Court said, in Patterson v. Colorado, 205 U.S. 454, 462, 51 L.Ed. 879, 881, 27 S.Ct. 556, 10 Ann. Cas. 689: In the first place, the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practiced by other governments', and they do not prevent a subsequent punishment of such as may be deemed contrary to the public welfare . . . (Second emphasis supplied).

See also Mugler v. Kansas, 123 U.S. 205, 214, 31 L.Ed. 652 (1887).

For the above reason, the Circuit erred in its opinion and this Court should grant plenary review of the appeal.

III.

> WHETHER OR NOT A DISTRICT COURT SHOULD BE FORECLOSED FROM DECIDING A MATTER DIFFERENTLY FROM THE DECISION OF THE UNITED STATES SUPREME COURT INVOLVING A SIMILAR STATUTE, WHEREIN THIS COURT DISMISSED AN APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION"?

Appellant had argued that when this Court dismissed for lack of a substantial Federal question the case of Art Theatre Guild, Inc., et al. v. Ewing,

421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (1975), it was controlling and the lower Federal courts should have been guided by that dismissal as an indication that the Court was upholding the Ohio statutory procedure upon which the Washington statute was based. See Hicks v. Miranda, 422 U.S. 332, 45 L.Ed.2d 223, 95 S.Ct. 2281 (1975).

Although the appellant presented such argument based on the above cases, the Circuit in deciding the instant case and the question of the procedure involved makes no mention of these cases or said argument in the opinion. It is submitted that since the Circuit decided that the restraining order did not render the statute unconstitutional as had been decided by the District Court, it should have decided that the remainder of the statute had been upheld by virtue of the fact that it provided for the same procedure set out under Ohio law and passed upon by this Court in the Art Theatre Guild case.

A review of the Ohio Supreme Court decision at 307 N.E.2d 917-918, shows that an order closing a theatre which exhibited a single obscene motion picture film for a substantial period of time is constitutionally valid, at least where a good faith owner could obtain release by (a) appearing in court, (b) filing a bond in the full value of the property, and (c) demonstrating to the court that he would prevent the nuisance from being reestablished (where the "nuisance" is regarded as being the exhibition of the particular film declared to be obscene). It is clear that the Ohio Supreme Court considered the question of prior restraint when it stated at 307 N.E.2d 916:

> Appellants' fourth, fifth and seventh arguments concerning the constitutionality of R.C. 3767.01 et seq., as a method for controlling obscenity, are premised upon the belief that the laws permit censorship without a prior judicial determination of obscenity. This contention has already been discussed and rejected in this opinion.

When an appeal to the Supreme Court is from the lower federal courts, summary disposition on the merits is by affirmance. On the other hand when the appeal to the Supreme Court is from a state court, summary disposition on the merits is by dismissal for want of a substantial federal question. In a note entitled, Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent, it was said at 52 B.U.L. Rev. 414-415:

> . . .Thus, the current working rule is that for summary dispositions on the merits, appeals from state court decisions are dismissed while federal court decisions are generally affirmed.[295] The distinction is reflected in Rule 16(1)(b) and (c), relating to motions to dismiss, in the case of state courts, or to affirm, in the case of federal courts.[296] At any rate, it is fairly clear that the effect of the decision is the same in both cases,[297] subject to one

qualification:

> [D]ismissal for want of a substantial federal question in a state court appeal is fully equivalent to affirmance on the merits in an appeal from a federal court insofar as the federal questions under 28 U.S.C. § 1257(1) and (2) are concerned.[298] (Footnotes omitted)

And at 52 B.U.L. Rev. 419, it is said:

> Closely allied to the use of the summary dismissal as precedent is the question of whether such dispositions really go to the 'merits' of the case acted upon. If these decisions were not 'on the merits,' just as dismissals for want of jurisdiction and the like, they would have no force as precedent. It has been suggested that the notion that dismissals for insubstantiality are on the merits is 'pure fiction.'[332] But when one considers that the summary dismissal is, as far as the Court's disposition of federal questions is concerned, the equivalent of the summary affirmance,[333] such objections evaporate. The dismissal, in particular,[334] has almost always been correctly characterized as on the merits.[335] At times, however, this fact has been given only begrudging

> acceptance.[336] Such reluctance may be attributable to the fact that an affirmance 'sounds' so much more like a decision on the merits, while a dismissal for want of a substantial federal question 'sounds' so much more like a jurisdictional defect. But whatever the potential theoretical differences that could be drawn, the fact remains that the Court draws no distinction between the two for purposes of deciding cases 'on the merits.' (Footnotes omitted)

Therefore, there is no distinction between a summary affirmance and a dismissal for insubstantial federal question.

Some guidance needs to be given to all courts with regard to this issue as was recently recognized in Colorado Springs Amusements, Ltd. etc. et al v. Rizzo, 428 U.S. 913, 49 L.Ed.2d 1222, 96 S.Ct. 3228 (1976)(J. Brennan, dissenting). See also Singleton v. Commissioner, 439 U.S. 940, 58 L.Ed.2d 335, 99 S.Ct. 335 (1978) (J. Stevens).

The Circuit court should have been bound by this consideration and therefore upheld the procedures as having been ruled upon. Because the court did not, this Court should grant plenary review to the appeal.

CONCLUSION

For each and all of the above reasons, this Court should grant plenary review to the appeal of this case from

the Ninth Circuit Court of Appeals. The matters are of sufficient public importance and need to be decided to establish that as this Court has held time and time again, obscenity is not protected free speech and there is in fact an effective statutorily constitutional method of controlling it.

Respectfully submitted,

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APPENDIX

SPOKANE ARCADES, INC.,
A Washington Corporation, Plaintiff,

v.

The Honorable Dixie Lee RAY, as Governor of the State of Washington in her representative capacity only, the Honorable Bruce K. Chapman, Secretary of State of Washington in his representative capacity only, the Honorable Slade Gorton, as Attorney General of the State of Washington in his representative capacity only, and Donald C. Brockett, Spokane County Prosecuting Attorney in his representative capaccity only, Defendants.

No. C 77-353

United State District Court,
E. D. Washington.

Feb. 6, 1978.

1 Proprietors of movie houses and book stores located in various cities in the state of Washington brought suit challenging the constitutionality of Washington's moral nuisance statute enacted by initiative 335. Injunctive and declaratory relief was sought. The District Court, Fitzgerald, J., held that (1) since plaintiffs, whose businesses were the type of establishments that Washington's moral nuisance statute purported to regulate, were threatened with the real and immediate prospect of prosecution under the statute, and since there was every reason to believe that state, county or city prosecutors, or private citizens, would imminently prosecute one or

more of the plaintiffs on the basis of the initiative, plaintiffs had standing to attack it on First and Fourteenth Amendment grounds, (2) neither Younger nor Pullman abstention was appropriate, since, relative to Younger, no state judicial proceedings involving the initiative were before Washington courts and there would thus be no disruption of state judicial proceedings, and since, relative to Pullman, the procedures of the initiative dealing with obscenity were neither obscure nor ambiguous and statutory construction to ascertain their meaning was not required, and (3) the procedures of prior restraint under the moral nuisance statute failed to withstand the strict scrutiny required of large-scale seizures of material protected under the First Amendment and were therefore unconstitutional; furthermore, the initiative's contempt provision was invalid as providing a summary procedure for trial of indirect contempts.

Judgment in favor of plaintiffs.

1. Constitutional Law Key 42.2(1)

Since plaintiffs, whose businesses were the type of establishments that Washington's moral nuisance statute enacted by initiative 335 purported to regulate, were threatened with the real and immediate prospect of prosecution under the statute, and since there was every reason to believe that state, county or city prosecutors, or private citizens, would imminently prosecute one or more of the plaintiffs on the basis of the initiative, plaintiffs had standing to attack it on First and Fourteenth Amendment grounds. RCWA 7.48.010 et seq.; U.S.C.A. Const. Amends. 1, 14.

2. Courts Key 508(1)

Normally, the mere possibility of erroneous initial application of constitutional standards by a state will not justify the enjoining of state statutory procedures.

3. Constitutional Law Key 90(3)

Statutes regulating expression must be narrowly drawn to avoid the jeopardizing of First Amendment rights. RCWA 7.48.010 et seq.; U.S.C.A.Const. Amend. 1.

4. Federal Courts Key 41

Neither Younger nor Pullman abstention was appropriate in suit challenging the validity of Washington's moral nuisance statute enacted by initiative 335, since, relative to Younger, no statute judicial proceedings involving the initiative were before Washington courts and there would thus be no disruption of state judicial proceedings, and since, relative to Pullman, the procedures of the initiative dealing with obscenity were neither obscure nor ambiguous and statutory construction to ascertain their meaning was not required. RCWA 2.60.010-2.60.900, 7.48.010 et seq.

5. Obscenity Key 2

The constitutionality of Washington's moral nuisance statute, enacted by initiative 335, was not foreclosed by prior authoritative decisions of the United States Supreme Court. RCWA 7.48.010 et seq.

6. Obscenity Key 1

Definitionally, obscenity may or may not be pornographic, and pornography may or may not be obscene.

7. Constitutional Law Key 90.1(1)

As a general rule, it is presumed that expression is protected under the First Amendment until the final judicial determination of obscenity is made, but the boundaries delineating obscene material from the nonobscene are murky and ill defined. U.S.C.A.Const. Amend. 1.

8. Constitutional Law Key 90(3)

Statutory prior restraints upon First Amendment rights in any setting must be carefully and closely drawn. U.S.C.A.Const. Amend. 1.

9. Constitutional Law Key 90(3)

Three safeguards must be established before prior restraint on First Amendment rights can withstand constitutional scrutiny: first, the burden of instituting judicial proceedings and of proving that the material is unprotected must rest on the censor; second, any restraint prior to judicial review can be imposed only for a specified period and only for the purpose of preserving the status quo; and third, a prompt judicial determination must be assured. U.S.C.A.Const. Amend. 1.

10. Constitutional Law Key 90.1(8)
Obscenity Key 2

The procedures of prior restraint under Washington's moral nuisance statute, enacted by initiative 335, failed to withstand the strict scrutiny required of large-scale seizures of material protected under the First Amendment and were therefore unconstitutional; furthermore, the initiative's contempt provision was invalid as providing a summary procedure for trial of indirect contempts. RCWA 7.48.010 et seq., 7.48.062, 7.48.080 U.S.C.A.Const. Amend. 1.

11. Contempt Key 52

Summary punishment is reserved for direct contempt, i. e., misbehavior which happens under the court's own eye within its hearing. RCWA 7.48.080.

12. Federal Courts Key 51

A declaratory judgment finding a state law unconstitutional involves less of an intrusion into the practices and policies of a state that an injunction.

Robert Eugene Smith, Atlanta, Ga., Jack R. Burns, Hubbard & Burns, P. S., Kirkland, Wash., for plaintiff.

Leland T. Johnson, Jr., Asst. Atty. Gen., Slade Gorton, Atty. Gen., Olympia, Wash., Donald C. Brockett, Spokane County Pros. Atty., Spokane, Wash., for defendants.

OPINION

FITZGERALD, District Judge.

The State of Washington, by initiative,[1] has adopted a broad and comprehensive law dealing with obscenity.

Under Initiative 335, certain places are declared to be "moral nuisances" and, as such, injurious to public morals. Section 2 of the initiative lists the types of places which constitute a moral nuisance. Among the establishments listed are theatres which exhibit "lewd films" and book stores which deal in "lewd publications."

Employing the procedures of Initiative 335, the attorney general, county or city prosecutors, or any private citizen may bring an equitable action to abate the alleged moral nuisance by filing a verified complaint. After the filing of the complaint with a request for a temporary injunction, the judge is required to grant a hearing within ten days. Upon application (but before any judicial determination of obscenity) the court can issue an ex parte order prohibiting anyone from removing the contents of the establishment pending the hearing on a motion for a temporary injunction. And even if the order banning removal should not extend to all goods in the establishment, the proprietor may be required to keep a full accounting of all business

1. Initiative Measure No. 335 (Approved November 8, 1977); 1913 c. 127, RRS § 946; RCW c. 7.48

transactions. Summary contempt punishment is allowed for violations of any injunctions issued under Initiative 335.

If on hearing for a temporary injunction it should be determined that a temporary injunction will issue and if the person controlling the alleged nuisance was given three days notice for the hearing, the issuing court may declare a temporary forfeiture of the real property involved until a final decision is made on a permanent injunction. After a final determination that a place is a moral nuisance, the judicially declared lewd matter is to be destroyed, funds received for the sale of such lewd matter is forfeited to the local government, and the real property where the nuisance was located may be closed to any purpose for up to one year.

The plaintiffs operate movie houses and book stores where sexually oriented materials are exhibited or sold to the public. They have brought this case in federal court claiming violations of federal constitutional rights and demand injunctive and declaratory relief. The central issue is whether Initiative 335 is constitutionally valid.

JURISDICTION

The plaintiffs' amended complaint claims violations of the United States Constitution, principally of the First Amendment and the Due Process provision of the Fourteenth Amendment and additional violations of the Fourth, Fifth and Sixth Amendments.

This court has jurisdiction under the provisions of 28 U.S.C. § 1343(3).

STANDING

[1] The plaintiffs operate a number of movie houses and book stores located in various cities in the State of Washington. There can be little doubt that the authors and supporters of Initiative 335 intended to provide an effective and comprehensive means of controlling obscenity in Washington. It is to be expected that the state attorney general and the county prosecutors of Washington will faithfully and energetically perform their duties under the law. Should they fail to do so, private persons are authorized by the initiative to maintain an action.

The plaintiffs' movie houses and book stores offer sexually oriented materials to the public which they contend are protected under the First Amendment of the United States Constitution. Threat of prosecutions is very real to the plaintiffs, and the consequences will be substantial. The initiative, by its terms, permits forfeiture of all money collected by admissions or sale, forfeiture of contents and fixtures of the place where any obscene materials are found, an order closing the place to any use for as long as a year, forfeiture of any lease on the premises, and an injunction perpetually enjoining the defendants from maintaining a nuisance anywhere.

[2, 3] Normally, the mere possibility of erroneous initial application of

constitutional standards by a state will not justify the enjoining of state statutory procedures. But statutes regulating expression must be narrowly drawn to avoid the jeopardizing of First Amendment rights. Dombrowksi v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L. Ed. 2d 22 (1965).

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. [citations omitted] As a corollary, the Court has altered its traditional rules of standing to permit--in the First Amendments area--'attacks on overly-broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' Dombrowski v. Pfister. Broadrick v.Oklahoma, 413 U.S. 601, 611-12, 93 S.Ct. 2908, 2916, 37 L. Ed.2d 830 (1973).

Nor does Broadrick v. Oklahoma undercut Dombrowski, as the defendants contend. In Broadrick, the Court reviewed an Oklahoma law which prohibited certain political activity by state employees. The Court explicitly adopted the broad

standing requirement of Dombrowski, at least as it pertains to speech or expression:

> Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.
> Broadrick v. Oklahoma, at 612, 93 S.Ct. at 2916.

But the Court in Broadrick did qualify its broad standing requirements, noting that where conduct and not speech is regulated, statutory overbreadth must be not only real but substantial.

It is plain that Initiative 335 is broadly drawn and purposely drafted to cast a broad net effectively prohibiting and deterring the dissemination of obscene material. The initiative exposes anyone who undertakes public exhibition or sale of sexually oriented material to the risk of losing not only condemned material but the proceeds of the business, and the place where the business is conducted if the material is later determined to be obscene. Beyond this, once proceedings have been filed, the court may enjoin disposition of the contents and materials which are in any way connected with maintaining a nuisance as defined under the law. The officer serving the restraining order is to inventory the contents and materials which appear

to him to be connected with a nuisance. The owner may also be required to account for all transactions involving the stock in trade.[2]

The punitve provision of the initiative would in all probability cause any reasonable person to avoid the risk of public exhibition or sale of any materials in which there was any real chance of an ultimate judicial determination of obscenity.

I, therefore, conclude that Initiative 335 is overbroad and that the plaintiffs have standing in this case to attack the initiative on First and Fourteenth Amendment grounds.

THE ABSTENTION DOCTRINE

[4] The defendants argue that the doctrine of abstention should be applied in this case. This issue was first considered by United States District Judge Marshall Neill when he heard the plaintiffs' motion for a restraining order. Judge Neill concluded that abstention was inappropriate. I agree.

The defendants misconceive the policy reasons supporting the abstention doctrine. Once jurisdiction is established, a district court is under a heavy responsibility to go forward with the matter before it. The Supreme Court has noted:

> The doctrine of abstention, under which a District

2. R.C.W. 7.48.062.

> Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest. County of Allegheny v. Frank Mashuda Co., 360 U.S 185, 188-189, [79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163] (1959).

The abstention doctrine was recently considered by the Supreme Court in the case of Ohio Bureau of Employment Service v. Hodory, 431 U.S. 471, 97 S.Ct. 1898, 52 L.Ed.2d 513 (1977). The Court reviewed the two principal bases underlying the doctrine:

> There are, of course, two primary types of federal abstention. The first, usually referred to as Pullman abstention, involves an inquiry focused on the possibility that the state courts may interpret a challenged state statute so as to eliminate, or at least to alter materially, the constitutional question presented. Railroad Comm'n v. Pullman Co., 312 U.S. 496, [61 S.Ct. 643, 85

L.Ed.971](1941). See Bellotti v. Baird, 428 U.S. 132, [96 S.Ct. 2857, 49 L.Ed.2d 844] (1976). The second type is Younger abstention, in which the court is primarily concerned in an equitable setting, with considerations of comity and federalism, both as they relate to the State's interest in pursuing an on-going state proceeding, and as they involve the ability of the state courts to consider federal constitutional claims in that context. Younger v. Harris, 401 U.S. 37, [91 S.Ct. 746, 27 L.Ed.2d 669] (1971). See Huffman v. Pursue, Ltd., 420 U.S. 592, [95 S.Ct. 1200, 43 L.Ed.2d 482] (1975); Juidice v. Vail, 430 U.S. 327, [97 S.Ct. 1211, 51 L.Ed.2d 376] (1977); Trainor v. Hernandez, 431 U.S. 434, [97 S.Ct. 1911, 52 L.Ed.2d 486] (1977), id., at 448 (concurring opinion). Hodory, 431 U.S. at 477, 97 S.Ct. at 1902, 52 L.Ed.2d at 520.

The arguments made for abstention rejected in Hodory were much like those made by the defendants here. In sum, the defendants contend that since the plaintiffs are free to pursue their remedies in state court, principles of comity require abstention. But the defendants' counsel acknowledged during argument that no state judicial proceedings involving Initiative 335 are before Washington courts, and since no state judicial proceedings are to be disrupted by this proceeding, I conclude that Younger abstention is not appropriate.

The defendants rely also on Pullman abstention. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Under Pullman, abstention is proper if a state court might construe state law in a manner which removes federal constitutional implications. In support of their argument for Pullman abstention, the defendants point to Bellotti v. Baird, 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976). But that case is inapplicable. The Court in Bellotti concluded that an interpretation by the Massachusetts Supreme Judicial Court might narrow or remove the federal questions presented and suggested that the district court should have certified the question under Massachusetts' procedure directly to the Supreme Judicial Court for its construction. Certification procedure is provided for under the Revised Code of Washington, 2.60.010-2.60.900, but the interpretation given to that statute by the Supreme Court of Washington precludes certifications in the present case.[3]

The procedures of Initiative 335 dealing with obscenity are neither obscure nor ambiguous, and statory construction to ascertain their meaning is not required. What is in issue is not the meaning of the statute but whether procedures under the statute meet constitutional requirements. Since these questions ultimately involve federal issues,

3. "Nor would this court take jurisdiction of a certified question which involves ultimately a federal constitutional issue, for again this would not meet the criteria of the certification statute" In re Elliott, Wash., 446 P.2d 347, 358 (1968).

certification is not warranted and Pullman abstention is not appropriate.

THE APPLICABILITY OF HICKS v. MIRANDA

The principal thrust of the defendants' argument on the constitutional issues is that statutory procedures similar to those here in question have been previously upheld by the United States Supreme Court; further, since district courts are bound to follow decisions of the Supreme Court under the rule of Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975), the constitutional issues before this court are foreclosed from present consideration.

I do not quarrel with the rule that district courts should follow the decisions of the Supreme Court and not relitigate issues of law decided by that Court. The question is whether defendants are correct in their contentions that procedures similar to those provided in Initiative 335 have been previously upheld in the Supreme Court.

The defendants rely on Grove Press, Inc., et al. v. Flask, et al., 326 F. Supp. 574 (N.D. Ohio 1970). In that case a three-judge court found the film "I Am Curious Yellow" to be obscene. Comparison of the Ohio law with Initiative 335 reveals that the procedures are in many ways similar. The district court concluded that the provisions of Ohio law that permitted an ex parte restraining order preventing the defendant or any person from interfering with the personal property and contents of an alleged nuisance was not constitutionally impermissible. But that issue was not squarely

before the court since a restraining order had been denied in state court and prior restraint was not involved. Moreover, unlike Initiative 335, the Ohio law did not permit the stock in trade to be inventoried or require a full accounting of all business transactions.

Commendably, the defendants point out that the judgment of the three-judge court in Grove Press, supra, was vacated and the case remanded after appeal to the United States Supreme Court.[4] Thus, the Supreme Court did not pass upon the constitutionality of the Ohio procedures in Grove Press, supra.

4. . . . Judgment vacated and case remanded for further consideration in light of Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419; Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446; Kaplan v. California, 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492; United States v. 12 200-ft. Reels Film, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500; United States v. Orito, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed. 2d 513; Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745; Roaden v. Kenucky, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed. 2d 757. MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART and MR. JUSTICE MARSHALL, would vacate the judgment and remand case for further proceedings not inconsistent with his dissent in Paris Adult Theatre I v. Slaton, 413 U.S. 73, 93 S.Ct. 2628. See Miller v.California, 413 U.S. 47, 93 S.Ct. 2607. . .
Grove Press, Inc., et al. v. Flask, et al., 413 U.S. 902, 93 S.Ct. 3026, 37 L.Ed.2d 1013 (1973).

The second case relied upon by the defendants is Ewing v. Without A Stitch, 37 Ohio St.2d 95, 307 N.Ed.2d 911 (1974). In that case the Supreme Court of Ohio granted a motion of certification allowing an appeal to consider only four issues:

> (1) The applicability of R.C. 3747.01 et seq. to a theater in cases involving the exhibition of a single obscene motion picture film; (2) the constitutionality of R.C. 3767.01 et seq. prescribing a method of controlling obscenity; (3) the mandatory or discretionary nature of the remedies set forth in R.C. 3767.01 et seq.; and (4) the availability of the nonstatutory remedy of forfeiture of box office receipts derived from the exhibition of a film after it was judicially determined to be obscene.

In its decision, the court observed that Ohio law does not permit censorship in any form prior to a judicial determination of obscenity. But the holding also undercuts the defendants' position in the present case in one other respect. The Ohio Supreme Court concluded that penalties may not be imposed under Ohio obscenity laws unless the person penalized has knowledge of the offending material's contents.[5]

5. The Ohio court noted Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959) where the Supreme Court struck down an ordinance imposing criminal penalties on a book store owner for mere possession of a

[5] Following the decision of the Supreme Court of Ohio, Ewing v. Without A Stitch, an appeal was taken to the United State Supreme Court. There the appeal was dismissed for want of substantial federal question. Art Theatre Guild, Inc. v. Ewing, 421 U.S. 923, 95 S.Ct. 1649, 44 L.Ed.2d 82 (1975). The summary dismissal of the appeal by the Supreme Court is understandable since no constitutional issue was presented. The film in question, "Without A Stitch," had been judicially determined to be obscene and under the principle of Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1954) was not entitled to constitutional protection. Thus, the constitutionality of Initiative 335 is not foreclosed by prior authoritative decisions of the United States Supreme Court.

THE CONSTITUTIONAL ISSUES

[6] The purpose of Initiative 335 is to control public exhibition and sale of obscene materials.[6] Passage of the initiative is clear proof that a voting majority of the State of Washington is

book later determined to be obscene even though the owner was without knowledge of the contents of the book. The Supreme Court reasoned that to impose criminal liability in such circumstances would force book store owners to restrict the books they sell to those they had inspected which would result in restricting the distribution of constitutionally protected, as well as obscene, books.

6. "Obscene" refers to that which is repugnant or disgusting to the senses, or offensive,

opposed to public dissemination of obscene films or printed matter. The critical issue is whether the procedures selected to accomplish the evident purpose of the law meets federal constitutional requirements.

[7] As a general rule, it is presumed that expression is protected under the First Amendment until a final judicial determination of obscenity is made.[7] But as may be seen, the boundaries delineating obscene material from the non-obscene are murky and ill-defined.

The first significant attempt by the United States Supreme Court to define the legal meaning of obscenity occurred in Roth v. United States. Justice Brennan, writing for the Court, determined that obscene material is not entitled to constitutional protection. Once a final judicial determination is made that material is obscene, neither First Amendment nor other constitutional rights are

> filthy, foul, repulsive, or loathsome. Except as used in the law, it does not necessarily have any sexual connotations. "Pornography," on the other hand, derived from the greek words for harlot and writing, is limited to depictions of sexual lewdness or erotic behavior. Definitionally, obscenity may or may not be pornographic, and pornography may or may not be obscene.
> Professor Frederick F. Schauer, The Law of Obscenity, (1976) p. 1.

7. U. S. v. Tupler, 564 F.2d 1294 (9th Cir. 1977). See also, Professor Schauer, The Law of Obscenity, 1976) p. 229

implicated. Under such circumstances, the State is not required to establish either compelling necessity or rational basis to destroy the pernicious material.

The principle that obscene material is beyond the scope of constitutional protections presupposes a definition of obscenity so that the boundary may be drawn between what is protected expression and what is not. The Supreme Court undertook in Roth to provide such a definition, recognizing at the outset that sex and obscenity are not synonymous. Material is said to be obscene if to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. This formulation was later augmented in Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966). Finally, in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), Chief Justice Burger, writing for the Court, restated the definition of obscenity as follows:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; [citations ommitted] (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, supra, at 24, 93 S.Ct. at 2615.

On the same day as Miller, the Supreme Court also decided Paris Adult Theatre v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973). Interestingly, in Paris Theatre Justice Brennan, the articulator of the Roth definition of obscenity, now dissented. He was convinced on the basis of 16 years of experience following Roth,[8] that no acceptable definition of obscenity could be devised which would strike an acceptable balance between the individual's constitutional rights on the one hand and the State's interest in regulating dissemination of sexually oriented material on the other.[9]

In Initiative 335 the word "lewd" is generally substituted for the term "obscene", and the definition of lewd

8. Justice Stewart, concurring in Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964), recognized the difficulty in attempting to define obscenity. He said in part: ". . . perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."

9. "[N]o one definition, no matter how precisely or narrowly drawn, can possibly suffice for all situations, or carve out fully suppressible expression from all media without also creating a substantial risk of encroachment upon the guarantees of the Due Process Clause and the First Amendment." Paris Adult Theatre, supra, 413 U.S., at 85, 93 S.Ct., at 2648.

generally follows the definition of obscenity set out in Miller.[10] The defendants suggest that since the terms "obscene or lewd" in Initiative 335 comport with the obscenity definition in Miller, the initiative cannot be found vague or overbroad. But the problem of regulating obscenity is in large part due to difficulty of definition. Freedom of expression involves sensitive and important constitutional rights. For these reasons the Supreme Court has consistently required that under the First Amendment efforts to regulate or prohibit obscenity be surround by procedural safeguards which

> . . . ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line . . Our insistence that regulations of obscenity scrupulously embody the most vigorous procedural safeguards . . . is . . . but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks . . .
> Bantam Books v. Sullivan, 372 U.S. 58, 66, 83 S.Ct. 631, 637, 9 L.Ed.2d 584 (1963).

Close examination of Initiative 335 inevitably leads to the conclusion that the initiative undertakes to regulate obscenity in a broad and comprehensive manner. The impact of the law is directed not only at the offending material

10. R.C.W. 7.48.050.

but at the place where such material may be found and at any entity or person connected with it.[11] The initiative applies to films, video tapes, photographs, books, magazines, pamphlets, illustrations, sound recordings and many other forms of expression.[12] It permits the attorney general or any prosecuting attorney or a citizen to initiate proceedings in the name of the State of Washington to abate as a nuisance obscene films or other material and to close every place where obscene films or material may be publicly exhibited or sold or held for those purposes.[13]

At the time proceedings are initiated under the initiative, the complainant is entitled to apply for a preliminary injunction, in which event the court must order a hearing within ten (10) days.[14] Immediately upon a complainant's filing of the proceedings, the judge is on good cause authorized to issue a restraining order enjoining the defendant and all other persons from removing or interfering with the contents and the personal property of the place where the nuisance is said to exist, excepting only stock in trade. The court may require an accounting of all business transactions taking place on the premises. The officer serving the restraining order is required to make and return to the court

11. R.C.W 7.48.052.

12. R.C.W. 7.38.050.

13. R.C.W. 7.48.058.

14. R.C.W. 7.48.060.

an inventory of the contents and personal property located and used in maintaining or conducting the nuisance.[15] A defendant must be given three (3) days notice prior to the hearing of the preliminary injunction and the court may order trial of the case expedited to the time set for the first hearing.[16]

If a preliminary injunction is granted, the court may declare temporary forfeiture on the use of the premises and issue an order closing the place for all uses until final decision is rendered.[17] An admission or finding of guilt of any person under laws dealing with obscenity or prostitution is admissible to prove existence of the nuisance and as prima facie evidence of nuisance and of knowledge and acquiescence and participation therein on the part of the person charged with maintaining the nuisance.[18] If existence of a nuisance is established at trial, the court shall enter judgment perpetually enjoining the defendant and any other person from further maintaining the nuisance complained of and enjoining the defendant from ever maintaining a nuisance anywhere.[19] Violations of the restraining order constitute contempts of court which may be summarily punished.[20]

15. R.C.W. 7.48.062.

16. R.C.W. 7.48.064.

17. R.C.W. 7.48.066.

18. R.C.W. 7.48.072.

19. R.C.W. 7.48.078.

20. R.C.W. 7.48.080.

The Supreme Court in Marcus v. Search Warrant, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961) considered Missouri procedures somewhat similar to those outlined in Initiative 335. In that case under Missouri law, police officers were permitted to file a sworn accusation in court alleging possession of obscene publications for sale. On the basis of the accusation, the court in an ex parte proceedings could issue a warrant requiring seizure of the offending material. The court in which the matter was pending was required promptly to set a time for hearing.

The Supreme Court held that the Missouri procedures failed to provide due process sufficient to safeguard constitutionally protected expression under the First and Fourteenth Amendments. The Court noted that the holding in Roth recognized no state power to restrict the dissemination of books which are not obscene:

> The question here is whether the use by Missouri in this case of the search and seizure power to suppress obscene publications involved abuses inimical to protected expression. We held in Roth v. United States, 354 U.S. 476, 485, [77 S.Ct. 1304, 1 L.Ed.2d 1498,] that 'obscenity is not within the area of constitutionally protected speech or press.' But in Roth itself we expressly recognized the complexity of the test of obscenity fashioned in that case and the vital necessity in its

application of safeguards to prevent denial of 'the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.' Id., p. 488, 77 S.Ct. 1304. We have since held that a State's power to suppress obscenity is limited by the constitutional protections for free expression. In Smith v. California, 361 U.S. 147, 155, [80 S.Ct. 215, 4 L.Ed.2d 205] we said, 'The existence of the State's power to prevent the distribution of obscene material does not mean that there can be no constitutional barrier to any form of practical exercise of that power,' inasmuch as 'our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene.' . . . For the use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publication. '. . . [T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . .' Speiser v. Randall, 357 U.S. 513, 525, [78 S.Ct. 1332, 2 L.Ed.2d 1460].

> It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedure it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech.
>
> We believe that Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled. Marcus v. Search Warrant, 367 U.S. at 729, 731, 81 S.Ct. at 1715.

While Initiative 335 does not authorize seizure of obscene material under warrant, it does, as has been described, authorize a judicial officer to restrain removal of contents or personal property of the place where a nuisance allegedly exists. Neither propety nor contents may be removed from the premises under the threat of contempt. Moreover, the court may order an accounting of all other business transactions involving the stock in trade.[21] Such restraints are permissible under Initiative 335 before a judicial determination is made whether the material is obscene. Since the boundary between obscene and non-obscene material is difficult to draw, the inevitable result must be that constitutionally protected material will be swept along with the obscene. The central point made in Marcus was that the Missouri procedures failed to provide adequate constitutional

21. R.C.W. 7.48.062.

protections for non-obscene material. Initiative 335 suffers from the same defect of permitting the suppression of protected expression.

[8] I have noted that some members of the Supreme Court now believe it impossible to define obscenity within the certainty required by law. Even more importantly, fundamental and sensitive constitutional rights are involved. Understandably, then, statutory prior restraints upon First Amendment rights in any setting must be carefully and closely drawn.

[9] The plaintiffs have attacked Initiative 335 as an unconstitutional prior restraint on freedom of expression. The defendants rejoin that prior restraints are not necessarily unconstitutional as long as they follow certain procedural requirements. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). Under the Freedman-Southeastern Promotions test, three safeguards must be established before the prior restraint can withstand constitutional scrutiny. "First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified period and only for the purpose of preserving the status quo. Third, a prompt judicial determination must be assured." Southeastern Promotions, supra, at 560, 95 S.Ct. at 1247.

This tripartite test for prior restraints has been examined in a series of cases following Freedman v. Maryland.

In Teitel Film Corp. v. Cusack, 390 U.S. 139, 88 S. Ct. 754, 19 L.Ed.2d 966 (1968), the Court reviewed a Chicago film censorship ordinance which required a film exhibitor to obtain a permit from the Chicago Police Department prior to showing the film. An administrative and judicial appeals procedure was available when a permit was denied. The Court found that the procedure violated the second and third parts of the Freedman standard in that it allowed 50-57 days to complete the administrative process, and there was no provision for a prompt judicial decision.

United States Post Office regulations aimed at mailers of allegedly obscene material were examined in Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971). Under the regulations, the Postmaster General made the determination that certain mailers were using the Post Office to convey materials or solicit money for materials which had been designated as obscene by the Postmaster General. In that event, the Postmaster General required the offending mail to be returned to the mailer. The mailer was prohibited from cashing postal money orders for the supposedly obscene mail. The Court found the regulations similar to those rejected in Marcus v. Search Warrant, and that they violated all three parts of the Freedman test.

The Court scrutinized another federal statute in United States v. Thirty-Seven Photographs, 402 U.S. 363, 91 S.Ct.

1400, 28 L. Ed.2d 822 (1971) and found that the customs seizure of sexually-explicit photographs met the first and second parts of the standard. In regard to the thirds aspect, "a prompt final judicial determination", the Court examined the facts of the particular seizure and found that promptness would have been possible had the photographs' owner not challenged the statute. The Court concluded that since federal statutes can be saved by judicial construction if the construction does not require a rewriting of the statute and if the judicial construction is in accord with the statute's legislative history, the customs seizure conformed to Freedman.

In Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973), the Court affirmed the seizure of a single copy of a motion picture film which was seized as evidence after a judge of the New York Criminal Court viewed the film at a theatre and immediately signed a warrant. Heller amplified the Court's holding in Lee Art Theatre v. Virginia, 392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d 1313 (1968) which provided that a full adversary hearing was not required before the seizing of a single piece of evidence if the prior judicial determination was constitutionally valid. The Heller decision carefull distinguished between seizure of individual pieces of evidence and prior restraints of quantities of material:

> Courts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain

> that the requirements of A Quantity of Books and Marcus are full met.
> Heller, 413 U.S. at 491, 93 S.Ct. at 2794.

The most recent Supreme Court considerations of prior restraints emphasize the ongoing adherence to the Freedman test. As noted above, Southeastern Promotions is a direct affirmation of the standard. Further, in McKinney v. Alabama, 424 U.S. 669, 96 S. Ct. 1189, 47 L.Ed.2d 387 (1976) the Court reviewed Alabama's obscenity regulation scheme and found that it did not conform to the "necessary sensitivity to freedom of expression" required by Freedman and Heller. McKinney, at 674, 96 S.Ct. at 1193. The continuing concern with the heavy burden of prior restraint is seen in the Court's rejection of a state court's gag order in Nebraska Press Assn. v. Stuart, 427 U.S. 539, 96 S. Ct. 2791, 49 L.Ed.2d 683 (1976). While the issue in that case was not obscenity, the Court's detailed discussion of prior restraint emphasized the constitutional limitations on censorship, and Justice Brennan's concurring opinion approvingly quoted a commentator's summary of the difficulties of such restraint:

> A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be

> applied than suppression through a criminal process; the procedures to not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows. T. Emerson, The System of Freedom of Expression 506 (1970)
> Nebraska Press Assn. v. Stuart, at 589-590, 96 S.Ct. at 2817.

While arguably satisfying the first and third parts of the Freedman test, Initiative 335 fails to meet the second requirement that any prior restraint may be imposed only for the purpose of preserving the status quo. As already pointed out, section 7 of the initiative[22] allows the court to issue an order "restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist . . ." Since a defendant could under this provision be prohibited from disposing of all of his merchandise pending a judicial determination, the State could during the interim period effectively shut down a business charged with conducting a nuisance.[23] Instead of

22. R.C.W. 7.48.062.

23. The provision is not saved by the limitation that ". . . pending such [judicial]

carefully limiting the scope of a restraining order to specific pieces of merchandise and allowing the business itself to continue to function, the initiative may well severely alter the status quo to the defendant's detriment.

Moreover, even if certain merchandise designated as "stock in trade" is not restrained, section 7 provides that "an inventory and full accounting of all business transactions may be required." Again, rather than maintaining the status quo, this provision imposes additional burdens on a defendant before a judicial determination of a moral nuisance has been made.

[10] I therefore conclude that the initiative's procedures of prior restraint fail to withstand the strict scrutiny required of large-scale seizures of material protected under the First Amendment, Heller, and are therefore unconstitutional.

Another serious question arises in connection with the contempt provision of the initiative. As part of the enforcement power conferred by Initiative 335,

> decision the stock in trade may not be so restrained." Presumably, "stock in trade" means that merchandise not considered to be part of the moral nuisance. But since the initiative nowhere defines the difference between "personal property and contents of the place where such nuisance is alleged to exist", which may be restrained, and "stock in trade", which may not be restrained, non-obscene as well as obscene material could be swept into the net of a restraining order.

any person found by a court to have violated any injunction prescribed by the initiative is subject to summary trial and punishment in the court which has issued the injunction. The contempt section[24] of the initiative provides in part:

> In case of the violation of any injunction granted under the provision of RCW 7.48.050 through 7.48.100 as now or hereafter amended, the court or judge may summarily try and punish the offender. The proceedings shall be commenced by filing with the clerk of court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause an attachment to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than three nor more than six months, or by both fine and imprisonment.

Under the law, a variety of acts may subject the actor to summary contempt proceedings. Those acts include removing or

24. R.C.W. 7.48.080.

mutilating a copy of the restraining order posted on the premises of the alleged nuisance; selling or projecting the allegedly obscene or pornographic books and films prior to a judicial determination; selling the stock in trade of a temporarily restrained establishement without keeping complete records of the transactions; and removing the contents and personal property of a restrained establishment.[25] While these forms of potential contempt differ, they will all ordinarily occur outside the direct presence of the court which has issued the temporary, preliminary or permanent injunction.

[11] But summary punishment is reserved for direct contempt, and direct contempt is defined as that misbehavior which happens "under [the court's] own eye within its hearing", Ex parte Terry, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed.405 (1888). As defined by a recent Ninth Circuit case arising in the State of Washington:

> Indirect contempt is contumacious behavior occurring beyond the eye or hearing of the court and for knowledge of which the court must depend upon the testimony of third parties or the confession of the contemnor. United States v. Marshall, 451 F.2d 372, 373 (1971).

Indirect contempts as such cannot be tried in the summary manner of 7.48.080. Rather, as the United States Supreme Court emphasized over half a certury ago:

25. R.C.W. 7.48.080.

> Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed. Cooke v. United States, 267 U.S. 517, 537, 45 S.Ct. 390, 395, 69 L.Ed. 767 (1925).

CONCLUSION

I conclude that statutory procedures similar to those contained in Initiative 335 have not previously been sustained in the United States Supreme Court. I conclude that the initiative is overbroad and fails to provide sufficient safeguards for constitutionally protected expression. Procedures under the initiative amount to a constitutionally impermissible prior restraint upon freedom of speech.

As noted, the plaintiffs now before this court are threatened with the real and immediate prospect of prosecution under Washington's moral nuisance statute. The plaintiffs' businesses are the type of establishments that the statute

purports to regulate. There is every reason to believe that the State of Washington, county or city prosecutors, or private citizens will imminently prosecute one or more of the plaintiffs on the basis of Initiative 335. As was noted by the Supreme Court in Steffel v. Thompson, 415 U.S. 452, 94 S. Ct. 1209, 39 L.Ed.2d 505 (1974):

> In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.
> Steffel, at 459, 94 S.Ct. at 1216.

In short, these plaintiffs and these defendants present an actual, continuing controversy to this court.

[12] My examination of the statute enacted by Initiative 335 leads me to conclude that the statute is facially unconstitutional. A declaratory judgment finding a state law unconstitutional involves less of an instrusion into the practices and policies of a state than an injunction. Steffel v. Thompson, and as I believe that the responsible state officers involved in this action will not prosecute under an unconstitutional statute, I find no present necessity for the issuance of an injunction.

Accordingly, I find that plaintiffs are entitled under 28 U.S.C. §2201 to a declaratory judgment that Initiative 335 is unconstitutional on its face.

SPOKANE ARCADES, INC., a Washington Corporation; Playtime Theatres, Inc., a Washington Corporation; J-R Distributors, Inc., a Washington Corporation; and Sportland Amusement, Inc., a Washington Corporation, Plaintiffs-Appellees,

v.

Donald C. BROCKETT, Prosecuting Attorney, etc., Defendants-Appellants,

and

The Honorable Dixie Lee Ray, as Governor of the State of Washington, et al., Defendants.

SPOKANE ARCADES, INC., a Washington Corporation; Playtime Theatres, Inc., a Washington corporation; J-R Distributors, Inc., a Washington corporation; and Sportland Amusement, Inc., etc., Plaintiffs-Appellees,

v.

The Honorable Dixie Lee RAY, as Governor of the State of Washington, in her representative capacity only, et al., Defendants,

and

Hon. Slade Gorton, as Attorney General of the State of Washington, in his representative capacity only, Defendant-Appellant.

Nos. 78-2369, 78-2520

United States Court of Appeals,
Ninth Circuit

Before KILKENNY and SNEED, Circuit Judges, and CALLISTER*, District Judge

SNEED, Circuit Judge:

At issue is the constitutionality of Wash. Rev. Code §§ 7.48.050-100 (West Supp. 1980), a moral nuisance law, which is directed primarily at prohibiting the public sale or exhibition of obscene materials. Appellee, a Washington corporation engaged in the exhibition, sale, and distribution of sexually oriented materials, filed suit in federal district court, requesting declaratory and injunctive relief to prevent enforcement of the statute.

The district court declared the statute unconstitutional under the First Amendment but declined to grant injunctive relief. Appellees no longer contest the denial of injunctive relief. Guided by Vance v. Universal Amusement Co., Inc., ___ U.S. ___, 100 S. Ct. 1156 (1980), 63 L.Ed.2d 413 (1980), we affirm the district court's holding with respect to the unconstitutionality of the Washington statute. Jurisdiction of the district court rested on 28 U.S.C. § 1331 (a), 28 U.S.C. § 1343, and 28 U.S.C. § 2202. Our jurisdiction rests on 28 U.S.C. § 1291.

*Honorable Marion J. Callister, United States District Judge for the District of Idaho, sitting by designation.

I.

THE STATUTE

The statute declares a number of places and articles to be moral nuisances, including any place that repeatedly or as a regular course of business exhibits "lewd matter."[1] The attorney general, city or county prosecutors, or, upon payment of a bond, any citizen may bring an action in equity to abate and enjoin a moral nuisance. Wash. Rev. Code § 7.48.058.[2]

If the allegations of the complaint have been sustained "to the satisfaction of the court or judge," the court

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1. The statutory definition of "lewd matter" expressly incorporates the standards approved in Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973). Wash. Rev. Code § 7.48.050(2).

Any place of business in which "lewd publications" constitute a principal part of the stock in trade is a moral nuisance. Id. § 7.48.052. The furniture, fixtures, and contents of a place found to be a moral nuisance, as well as the proceeds from the sale or exhibition of obscene materials, are also labelled moral nuisances. Id. § 7.48.054.

2. If the complainant applies for a temporary injunction, a hearing on the application must be held within ten days. Id. § 7.48.060. Service of the complaint and notice to the defendant must be made at least three days before the hearing. Id. § 7.48.064.

shall issue a temporary injunction against continuance of the nuisance. Unless the defendant demonstrates that the nuisance has been abated, or unless the owner of the property has taken action as a "good faith" lessor to void the lease, the court shall also issue an order closing the place alleged to be a nuisance against use "for any purpose," pending trial and final decision of the case. Id. § 7.48.066.

The trial on the merits may be consolidated with the hearing for the temporary injunction, id. § 7.48.064; otherwise, the trial shall be scheduled for the first term of court and shall have priority over all other cases except crimes, election contests, or injunctions. Id. § 7.48.070. If the existence of the nuisance is established at trial, the court shall issue a permanent injunction against the maintenance of the nuisance, id. § 7.48.076, and the closing order will be extended for one year. Id. § 7.48.078.[3] Violation of any injunc-

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3. In addition, lewd matter shall be destroyed, and other personal property used in conducting the nuisance shall be sold, id. § 7.48.078; and all money and other consideration found to be a nuisance shall be forfeited to the local government. Id. § 7.48.090. Persons found to have maintained the nuisance shall be required to pay a three hundred dollar penalty as well as the costs of abating the nuisance. Id. §§ 7.48.076, 7.48.078. The statute provides that owners of property used to maintain the nuisance who lack knowledge of the nuisance may recover their personal property, id. § 7.48.078; they may also prevent the issuance of any closing or restrain-

tion issued under the statute is[4] punishable as contempt. Id. § 7.48.080.

II.

ABSTENTION

Appellants contend that under Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), the district court should have abstained from deciding this case so as to allow state courts the first opportunity to construe the statutory provisions. We disagree. The district court correctly held that Pullman abstention would be inappropriate.

First, appellee is not required to exhaust all state remedies prior to bringing this action in federal court. Zwickler v. Koota, 389 U.S. 241, 251, 88 S.Ct. 391, 397, 19 L.Ed.2d 444 (1967); Vance, _____ U.S. _____, 100 S.Ct. 1156, 63 L.Ed.2d 413. Second, appellants do not allege that their statute is vague. Even if there are vagueness difficulties, the dispositive issue is whether the procedures are capable of a construction that could avoid the constitutional issues. We do not think that the procedures are capable of such a construction. Therefore, we conclude that Pullman abstention would not eliminate or materially alter the constitutional

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ing order, or obtain the cancellation of any such order already issued, by filing a bond and giving assurance that the nuisance will be abated. Id. § 7.48.068.

4. Contempt may be punished by a fine of between two hundred and one thousand dollars, or imprisonment in the county jail for a term of between three and six months, or both. Id. § 7.48.080.

issues presented. See Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 481 97 S.Ct. 1898, 1904, 52 L.Ed.2d 513 (1976). That First Amendment rights of expression are at stake makes abstention all the more inappropriate. Zwickler, 389 U.S. at 252, 88 S.Ct. at 397; See also Vance, _____ U.S. _____, 100 S. Ct. 1156, 63 L.Ed.2d 413.

III.

THE TEMPORARY RESTRAINING ORDER

The statute permits a court, upon a showing of good cause, to issue a temporary ex parte restraining order prohibiting removal of or interference with the personal property and contents of a place alleged to be a nuisance. The stock in trade may not be restrained but an inventory and full accounting of all business transactions may be required. Wash. Rev. Code § 7.48.062. The purpose of the restraining order is apparently to prevent the removal of evidence or contraband; exhibition of any film or the sale of any publication is not forbidden. Hence, the order imposes no prior restraint.

The Supreme Court has indicated that restraints imposed for specified brief periods to preserve the status quo are permissible. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560, 95 S.Ct. 1239, 1247, 43 L.Ed.2d 448; Heller v. New York, 413 U.S. 483, 490, 93 S.Ct. 2789, 2793, 37 L.Ed.2d 745 (1973). Since this restraining order will expire within ten days after its issuance, Wash. Rev. Code § 7.48.060, we find it to be permissible.

IV.

THE ABATEMENT INJUNCTION

The statute permits a court to issue temporary and permanent injunctions against the maintenance of a nuisance. Wash. Rev. Code § 7.48.066. In reviewing this section, we are required to acknowledge that

> "the burden of supporting an injunction against future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication."

Vance, _____ U.S. at _____, 100 S. Ct. at 1161. For the following reasons, we conclude that with respect to this section the heavy burden of justification has not been discharged. It constitutes an impermissible prior restraint.

First, the injunction may be issued if the allegations of the complaint are demonstrated "to the satisfaction of the court. . . ." Wash. Rev. Code § 7.48.066. No limits are set forth in the statute to confine the discretion of the court to issue the temporary abatement injunction.

Second, There is no assurance that there will occur the required prompt final judicial determination on the merits. Southeastern Promotions, 420 U.S. at 560, 95 S.Ct. at 1247. The provision allowing permissive consolidation of the trial on the merits with the hearing for the temporary injunction is inadequate since there is no assurance that such a consolidation will occur.

The priority provision is likewise inadequate. Requiring that the moral nuisance action be scheduled for the first term of court, and giving priority over other cases except crimes, election contests, and injunctions, does not offer the assurance of a prompt final determination. Though the Supreme Court has set no precise limits on the period within which a final judicial determination must be made, in Freedman v. Maryland, 380 U.S. 51, 55, 85 S.Ct. 734, 737, 13 L.Ed.2d 649 (1965), the Court suggested that four to six months was too long. See also Southeastern Promotions, 420 U.S. at 562, 95 S.Ct. at 1248. There is nothing in the Washington statute to assure that final decisions would be rendered in a shorter period.

Third, the injunction operates to prevent the sale or exhibition of named or unnamed films or publications in the future even though not yet declared obscene. Since a defense of nonobscenity presumably is unavailable at a trial for violation of an injunction, see Walker v. Birmingham, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1966), this type of prior restraint is "more onerous and more objectionable than the threat of criminal sanctions after a film has been exhibited." Vance, _____ U.S. at _____, 100 S. Ct. at 1161.

Fourth, the temporary injunction provision is not saved by the fact that it may be lifted if the owner/operator can show "to the satisfaction of the judge" that the nuisance has been abated. In addition to the imprecise standard given the court, the provision impermissibly shifts the burden of showing a lack of obscenity to the person

operating the alleged nuisance. Both the burden of instituting proceedings and the burden of persuasion "must rest on the censor." Southeastern, 420 U.S. at 560, 95 S.Ct. at 1247; Freedman, 380 U.S. at 58-59, 85 S.Ct. at 738-739.

The abatement injunction provision lacks sufficient safeguards to comply with the First Amendment. As the Court stated in Vance:

> "[T]he absence to any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures, without regard to the context in which they are displayed, precludes the enforcement of these nuisance statutes against . . . exhibitors."

_____ U.S. at _____, 100 S. Ct. at 1162.

V.

THE CLOSURE ORDER

The statute permits a court to enter an order closing a place of business against use "for any purpose" if such place is found to be a nuisance. The order is initially temporary, but after a final decision on the merits, it will be extended for one year. Wash. Rev. Code §§ 7.48.066, 7.48.078.

The ability of a court to close a place temporarily because obscene materials may have been sold, distributed, or exhibited on the premises is an impermissible prior restraint. We express no opinion with respect to what

circumstances, if any, would justify a closure subsequent to a determination that conforms in all respects to the First Amendment.

VI.

SEVERABILITY

Appellants contend that the entire statute should not be invalidated merely because some portions are found to be unconstitutional. This argument is unpersuasive. The injunction and closing order provisions represent a vital part of the statutory scheme. To eliminate these enforcement provisions would essentially eviscerate the statute and "would create a program quite different from the one the [people] actually adopted." Sloan v. Lemon, 413 U.S. 825, 834, 93 S.Ct. 2982, 2987, 37 L.Ed.2d 939 (1973). This we decline to do. That the statute contains a severability clause, Wash. Rev. Code § 7.48.900, does not authorize us to indulge in major revisions to salvage the statute. Id. at 833-34, 93 S.Ct. at 2987. We are certain that the legislature of the State of Washington can dc this better than we.

Affirmed.

Chapter 7.48

NUISANCES

Sections

7.48.050 Moral nuisances--Definitions.
7.48.052 Moral nuisances.
7.48.054 Moral nuisance--Personal property--Effects of notice.
7.48.056 Abate moral nuisance--Enjoin owner.
7.48.058 Maintaining action to abate moral nuisance--Bond.
7.48.060 Moral nuisance--Jurisdiction--Filing a complaint.
7.48.062 Moral nuisance--Restraining orders--Violations.
7.48.064 Moral nuisance--Hearing--Notice--Consolidation with trial.
7.48.066 Finding of moral nuisance--Orders.
7.48.068 Abatement of moral nuisance by owner--Effect on injunction.
7.48.070 Moral nuisance--Priority of action on calendar.
7.48.072 Moral nuisance--Effects of admission or finding of guilt.
7.48.074 Moral nuisance--Evidence of reputation--Admissibility.
7.48.076 Moral nuisance--Trial--Costs--Dismissal--Judgment.
7.48.078 Moral nuisance--Judgment--Penalties--Disposal of personal property.
7.48.080 Moral nuisance--Contempt for violation of injunction.
7.48.085 Moral nuisance--Property owner may repossess.
7.48.090 Moral nuisance--Contraband--Forfeitures.

7.48.100 Moral nuisance--Immunity of certain motion picture theatre employees.
7.48.900 Severability--Initiative Measure No. 335.

7.48.050 Moral nuisances--Definitions. The definitions set forth in this section shall apply throughout this chapter as they relate to moral nuisances.

(1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the lewd matter, or knowledge of the acts of lewdness, assignation, or prostitution which occur on the premises.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which depicts or describes patently offensive representations or descriptions of:

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political, or scientific value.

(3) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.

(4) "Matter" shall mean a motion picture film or a publication or both.

(5) "Moral nuisance" means a nuisance which is injurious to public morals.

(6) "Motion picture film" shall include any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;

(d) Films, glass slides, or transparencies, either in negative or positive form, designed for exhibition by projection on a screen;

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(7) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(8) "Place" includes, but is not limited to, any building, structure, or places, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(9) "Publication" shall include any book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or a motion picture film which is offered for sale or exhibited in a coin-operated machine.

(10) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer of possession of, lewd matter. [Initiative Measure No. 335 § 1 (Approve November 8, 1977); 1913 c 127 § 1; RRS § 946-1.]

7.48.052 Moral nuisances. The following are declared to be moral nuisances:

(1) Any and every place in the state where lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every place in the state where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;

(3) Any and every lewd film which is publicly exhibited, or posessed for such purpose at a place which is a moral nuisance under this section;

(4) Any and every place of business in the state in which lewd publications constitute a principal part of the stock in trade;

(5) Any and every lewd publication possessed at a place which is a moral nuisance under this section;

(6) Every place which, as a regular course of business, is used for the purpose of lewdness, assignation, or prostitution, and every such place in or upon which acts of lewdness, assignation, or prostitution are conducted, permitted, carried on, continued, or exist;

(7) All public houses or places of resort where illegal gambling is carried on or permitted; all houses or places within any city, town, or village, or upon any public road, or highway where drunkenness, illegal gambling, fighting, or breaches of the peace are carried on or permitted; all opium dens, or houses, or places of resort where opium smoking is permitted. [Initiative Measure No. 335 § 2 (Approved November 8, 1977).]

7.48.054 Moral nuisance--Personal property--Effects of notice. The following are also declared to be moral nuisances, as personal property used in conducting and maintaining a moral nuisance;

(1) All moneys paid as admission price to the exhibition of any lewd film found to be a moral nuisance;

(2) All valuable consideration received for the sale of any lewd publication which is found to be a moral nuisance;

(3) The furniture, fixtures, and contents of a place which is a moral nuisance.

From and after service of a copy of the notice of hearing of the applciation for a preliminary injunction, provided for in RCW 7.48.064, upon the place or its manager, acting manager, or person then in charge, all such persons are deemed to have knowledge of the acts, conditions, or things which make such place a moral nuisance. Where the circumstantial proof warrants a determination that a person had knowledge of the moral nuisance prior to such service of process, the court shall make such finding. [Initiative Measure No. 335 § 3 (Approved November 8, 1977).]

7.48.056 Abate moral nuisance--Enjoin owner. In addition to any other remedy provided by law, any act, occupation, structure, or thing which is a moral nuisance may be abated, and the person doing such act or engaged in such occupation, and the owner and agent of the owner of any such structure or thing, may be enjoined as provided in this chapter. [Initiative Measure No. 335 § 4 (Approved November 8, 1977).]

7.48.058 Maintaining action to abate moral nuisance--Bond. The attorney general, prosecuting attorney, city attorney, city prosecutor, or any citizen of the county may maintain an action of an equitable nature in the name of the state of Washington upon the relation of such attorney general, prosecuting attorney, city attorney, city prosecutor, or citizen, to abate a moral nuisance, to perpetually enjoin all persons from maintaining the same, and to enjoin the use of any structure or thing adjudged to be a moral nuisance.

If such action is instituted by a private person, the complainant shall execute a bond to the person against whom complaint is made, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than five hundred dollars, to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, and the court finds there was no reasonable grounds or cause for said action and the case is dismissed for that reason before trial or for want of prosecution. No bond shall be required of the attorney general, prosecuting attorney, city attorney, or city prosecutor, and no action shall be maintained against such public official for his official action when brought in good faith. [Initiative Measure No. 335 § 5 (Approved November 8, 1977).]

7.48.060 Moral nuisance--Jurisdiction--Filing a complaint. The action provided for in RCW 7.48.058 shall be brought in any court of competent jurisdiction in the county in which the property is located. Such action shall be commenced by the filing of a verified

complaint alleging the facts constituting the nuisance. After the filing of said complaint, application for a temporary injunction may be made to the court in which the action is filed, or to a judge thereof, who shall grant a hearing within ten days after the filing. [Initiative Measure No. 335 § 6 (Approved November 8, 1977); 1913 c 127 § 2; RRS § 946-2.]

7.48.062 Moral nuisance--Restraining order--Violations. Where such application for a temporary injunction is made, the court or judge thereof may, on application of the complainant showing good cause, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon, except that pending such decision, the stock in trade may not be so restrained, but an inventory and full accounting of all business transactions may be required.

The restraining order may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by both such delivery and posting. The officer serving such restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance.

Any violation of such restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof while the same remains in force is a contempt of court if such posted order contains therein a notice to that effect. [Initiative Measure No. 335 § 7 (Approved November 8, 1977).]

7.48.064 Moral nuisance--Hearing--Notice--Consolidation with trial. A copy of the complaint, together with a notice of the time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant at least three days before such hearing. The place may also be served by posting such papers in the same manner as is provided for in RCW 7.48.062 in the case of a restraining order. If the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter of course.

Before or after the commencement of the hearing of an application for a temporary injunction, the court, on application of either of the parties or on its own motion, may order the trial of the action on the merits to be advanced and consolidated with the hearing on the application for the temporary injunction. Any evidence received upon an application for a temporary injunction which would be admissible in the trial on the merits becomes a part of the record of the trial and need not be repeated as to such parties at the trial on the merits. [Initiative Measure No. 335 § 8 (Approved November 8, 1977).]

7.48.066 Finding of moral nuisance --Orders. If upon hearing, the allegations of the complaint are sustained to

the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without additional bond, restraining the defendant and any other person from continuing the nuisance.

If at the time the temporary injunction is granted, it further appears that the person owning, in control of, or in charge of the nuisance so enjoined had received three days notice of the hearing, then the court shall declare a temporary forfeiture of the use of the real property upon which such public nuisance is located and the personal property located therein, and shall forthwith issue an order closing such place against its use for any purpose until a final decision is rendered on the application for a permanent injunction, unless:

(1) The person owning, in control of, or in charge of such nuisance shows to the satisfaction of the court or judge, by competent and admissible evidence which is subject to cross-examination, that the nuisance complained of has been abated by such person; or

(2) The owner of such property, as a "good faith" lessor, has taken action to void said lease as is authorized by RCW 7.48.085.

Such order shall also continue in effect for such further period as the order authorized in RCW 7.48.062 provided. If no order has been issued pursuant to RCW 7.48.062, then an order restraining the removal or interference with the personal property and contents located therein shall be issued. Such restraining order shall be served and the inventory of such property shall be made and filed as provided for in RCW 7.48.062.

Such order shall also require such persons to show cause within thirty days why such closing order should not be made permanent, as provided for in RCW 7.48.078. [Initiative Measure No. 335 § 9 (Approved November 8, 1977).]

7.48.068 Abatement of moral nuisance by owner--Effect on injunction. The owner of any real or personal property to be closed or restrained, or which has been closed or restrained, may appear after the filing of the complaint and before the hearing on the application for a permanent injunction.

The court, if satisfied of the good faith of the owner of the real property and of the innocence on the part of any owner of the personal property of any knowledge of its use as a nuisance, and that with reasonable care and diligence such owner could not have known thereof shall, at the time of the hearing on the application for the temporary injunction and upon payment of all costs incurred and upon the filing of a bond by the owner of the real property with sureties to be approved by the clerk in the full value of the property to be ascertained by the court, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept, refrain from issuing any order closing such real property or restraining the removal or interference with such personal property, and, if such temporary injunction has already been issued, shall cancel said order and shall deliver such real or personal property, or both, to the respective owners thereof. The release of any real or personal property under this section shall not release it

from any judgment, lien, penalty, or liability to which it may be subjected by law. [Initiative Measure No. 335 § 10 (Approved November 8, 1977).]

7.48.070 Moral nuisance--Priority of action on calendar. The action provided for in RCW 7.48.058 shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions. [Initiative Measure No. 335 § 11 (Approved November 8, 1977); 1913 c 127 § 3; RRS § 946-3.]

7.48.072 Moral nuisance--Effects of admission or finding of guilt. In such action, an admission or finding of guilty of any person under the criminal laws against lewdness, prostitution, or assignation at any such place is admissible for the purpose of proving the existence of such nuisance, and is prima facie evidence of such nuisance and of knowledge of, and of acquiescence and participation therein, on the part of the person charged with maintaining such nuisance. [Initiative Measure No. 335 § 12 (Approved November 8, 1977).]

7.48.074 Moral nuisance--Evidence of reputation--Admissibility. At all hearings upon the merits, evidence of the general reputation of the building or place constituting the alleged nuisance, of the inmates thereof, and of those resorting thereto, is admissible for the purpose of proving the existence of such nuisance. [Initiative Measure No. 335 § 13 (Approved November 8, 1977).]

7.48.076 Moral nuisance--Trial--Costs--Dismissal--Judgment. If the action is brought by a person who is a

citizen of the county, and the court finds that there were no reasonable grounds or probable cause for bringing said action, and the case is dismissed before trial for that reason or for want of prosecution, the costs, including attorney's fees, may be taxed to such person.

If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere. The entire expenses of such abatement, including attorney's fees, shall be recoverable by the plaintiff as a part of his costs of the lawsuit.

If the complaint is filed by a person who is a citizen of the county, it shall not be dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action should not be dismissed, he may direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued for more than one term of court, any person who is a citizen of the county or has an office therein, or the attorney general, the prosecuting attorney, city attorney, or city prosecutor, may be substituted for the complainant and prosecute said action to judgment. [Initiative Measure No. 335 § 14 (Approved November 8, 1977).]

7.48.078 Moral nuisance--Judgment--Penalties--Disposal of personal property. If the existence of a nuisance is admitted or established in an action as provided for in RCW 7.48.058 or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance and not already released under authority of the court as provided for in RCW 7.48.066 and 7.48.068, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Lewd matter shall be destroyed and shall not be sold.

Such judgment shall impose a penalty of three hundred dollars for the maintenance of such nuisance, which penalty shall be imposed against the person or persons found to have maintained the nuisance, and, in case any owner or agent of the building found to have had actual or constructive notice of the maintenance of such nuisance, against such owner or agent, and against the building kept or used for the purposes of maintaining a moral nuisance, which penalty shall be collected by execution as in civil actions, and when collected, shall be paid into the current expense fund of the county in which the judgment is had.

Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in RCW 7.48.068 or, if not so furnished, shall continue for one year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was then issued,

shall include an order directing the effectual closing of the place against its use for any purpose and keeping it closed for a period of one year unless sooner released.

The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in RCW 7.48.068.

Owners of unsold personal property and contents so seized must appear and claim the same within ten days after such order of abatement is made, and prove innocence to the satisfaction of the court of any knowledge of such use thereof, and that with reasonable care and diligence they could not have known thereof. If such innocence is established, such unsold personal property and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court. [Initiative Measure No. 335 § 15 (Approved November 8, 1977).]

7.48.080 Moral nuisance--Contempt for violation of injunction. In case of the violation of any injunction granted under the provisions of RCW 7.48.050 through 7.48.100 as now or hereafter amended, the court or judge may summarily try and punish the offender. The proceedings shall be commenced by filing with the clerk of the court an information under oath, setting out the alleged

facts constituting such violation, upon which the court or judge shall cause an attachment to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than three not more than six months, or by both fine and imprisonment. [Initiative Measure No. 335 § 16 (Approved November 8, 1977); 1913 c 127 § 4; RRS § 946-4.]

7.48.085 Moral nuisance--Property owner may reposses. If a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of maintaining a moral nuisance, such use makes void at the option of the owner the lease or other title under which he holds, and without any act of the owner causes the right of possession to revert and vest in such owner, who may without process of law make immediate entry upon the premises. [Initiative Measure No. 335 § 17 (Approved November 8, 1977).]

7.48.090 Moral nuisance--Contraband--Forfeitures. Lewd matter is contraband, and there are no property rights therein. All personal property declared to be a moral nuisance in RCW 7.48.052 and 7.48.054 and all moneys and other consideration declared to be a moral nuisance under RCW 7.48.056 are the subject of forfeiture to the local government and are recoverable as damages in the county

wherein such matter is sold, exhibited, or otherwise used. Such moneys may be traced to and shall be recoverable from persons who, under RCW 7.48.064, have knowledge of the nuisance at the time such moneys are received by them.

Upon judgment against the defendants in legal proceedings brought pursuant to RCW 7.48.050 through 7.48.100 as now or hereafter amended, an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a public nuisance under this section. An amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be forfeited to the general funds of the city and county governments wherein such matter is sold or exhibited, to be shared equally, as a forfeiture of the fruits of an unlawful enterprise and as partial restitution for damages done to the public welfare, public health, and public morals.

Where the action is brought pursuant to RCW 7.48.050 through 7.48.100 as now or hereafter amended, special injury need not be proven, and the costs of abatement are a lien on both the real and personal property used in maintaining the nuisance. Costs of abatement include, but are not limited to the following:

(1) Investigative costs;

(2) Court costs;

(3) Reasonable attorney's fees arising out of the preparation for and trial of the cause, appeals therefrom, and other costs allowed on appeal;

(4) Printing costs of trial and appellate briefs, and all other papers filed in such proceedings. [Initiative

Measure No. 335 § 18 (Approved November 8, 1977); 1927 c 94 § 1; 1913 c 127 § 5; RRS § 946-5.]

7.48.100 Moral nuisance--Immunity of certain motion picture theatre employees. The provisions of any criminal statutes with respect to the exhitition of, or the possession with the intent to exhibit, any obscene film shall not apply to a motion picture projectionist, usher, or ticket taker acting within the scope of his employment, if such projectionist, usher, or ticket taker (1) has no financial interest in the place wherein he is so employed, other than his salary, and (2) freely and willingly gives testimony regarding such employment in any judicial proceedings brought under RCW 7.48.050 through 7.48.100 as now or hereafter amended, including pretrial discovery proceedings incident thereto, when and if such is requested, and upon being granted immunity by the trial judge sitting in such matters. [Initiative Measure No. 335 § 19 (Approved November 8, 1977); 1927 c 94 § 2; 1913 c 127 § 6; RRS § 946-6.]

7.48.900 Severability--Initiative Measure No. 335. If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected. [Initiative Measure No. 335 § 20 (Approved November 8, 1977).]

FILED

December 16, 1980

RICHARD H. DEANE
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SPOKANE ARCADES, INC., a Washton Corporation; PLAYTIME THEATRES, INC., A Washington Corporation; J-R DISTRIBUTORS, INC., A Washington Corporation; and SPORTLAND AMUSEMENT, INC., A Washington Corporation,	No.78-2369 No.78-2520
Plaintiffs-Appellees,	ORDER
v.	
DONALD C. BROCKETT, Prosecuting Attorney, etc.,	
Defendants-Appellants,	
and	
THE HONORABLE DIXIE LEE RAY, As Governor of the State of Washington, et al.,	
Defendants.	

Before: KILKENNY and SNEED, Circuit Judges, and CALLISTER*, District Judge

*Honorable Marion J. Callister, United States District Judge for the District of Idaho, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

RECEIVED
RICHARD H. DEANE
Clerk, U.S.Court of Appeals

FEB 9, 1981
Filed 2/9/81 pn

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SPOKANE ARCADES, INC., a Washton Corporation; PLAYTIME THEATRES, INC., A Washington Corporation; J-R DISTRIBUTORS, INC., A Washington Corporation; and SPORTLAND AMUSEMENT, INC., A Washington Corporation,	No.78-2369 D. C. No. C-77-353
Plaintiffs-Appellees,	
v.	NOTICE OF APPEAL
DONALD C. BROCKETT, Prosecuting Attorney, etc.,	
Defendants-Appellants,	
and	
THE HONORABLE DIXIE LEE RAY, As Governor of the State of Washington, et al.,	
Defendants.	

Notice is hereby given that Donald C. Brockett, the defendant abovenamed, hereby appeals to the Supreme Court of the United States from the final Judgment and Opinion affirming the District Court entered in this action on

October 23, 1980, a Petition for Rehearing having been denied on December 16, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

/s/ Donald C. Brockett
Counsel for defendant